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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTHONY M. EATON and
JEROME CHARLES RUZICKA

Appeal 2009-003730
Application 09/492,913
Technology Center 2600

Before ROBERT E. NAPPI, JAY P. LUCAS, and
BRADLEY W. BAUMEISTER, *Administrative Patent Judges*.

BAUMEISTER, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Pursuant to 37 C.F.R. § 41.52, Appellants have requested rehearing of our Decision on Appeal (“Decision”), mailed August, 19, 2010. Therein, we affirmed the Examiner’s obviousness rejections of claims 1-5, 15-72, and 93-95 over Hagen (US 6,424,722 B1; issued July 23, 2002) and Anderson (US 5,721,783; issued Feb. 24, 1998), either alone or in further combination with at least one of six additional references (*see* Decision 2-3).

We deny Appellants’ request to modify that decision.

ANALYSIS

Appellants base their Request for Rehearing (“Req. Reh’g”) on three contentions. We address them in order.

I.

Appellants contend that the Examiner’s assertions regarding Anderson that form the basis of the rejection are factually incorrect (Req. Reh’g 2). Specifically, Appellants argue that the Examiner erred in finding that Anderson’s remote processor unit (RPU) 16 programs earpiece 10 because the RPU is, instead, part of the hearing aid program that, in combination with the earpiece, is the object of programming (Req. Reh’g 2, 4-6). Appellants also contend that Anderson’s ““secondary wireless link circuitry” 19 is neither expressly nor inherently a programming fitting server” (Req. Reh’g 2, 6).

We need not resolve the question of whether Anderson’s RPU specifically programs the earpiece or is, alternatively, the object of programming. Nor must we resolve whether Anderson’s secondary wireless link specifically constitutes a programming fitting server. The Examiner

relies on Hagen for disclosing a mobile device (portable multiprogram unit (PMU) 320) and a programming fitting server (host computer 236) (Ans. 3). Furthermore, the rationale underlying the Examiner's rejection includes a broader proposition: Anderson teaches that it was known to download software from a network to a mobile device either through a wired connection or wirelessly (*see* Ans. 3-4). The veracity of this broader proposition is sufficient to sustain the Examiner's rejection, and Appellants acknowledge that Anderson does teach this broader proposition. *See* Req. Reh'g 6 (stating "Anderson loads, through the secondary wireless link, a hearing test program controlling the operation of the RPU during a hearing test into the RPU in order to temporarily store the hearing test program in the RPU for the duration of the hearing test"); *see also id.*:

Anderson indicates that element 19 is "optional secondary wireless circuitry[.]" and states: "The RPU 16 may be connected (via wired or wireless means 18) to optional secondary wireless link circuitry 19 that allows wireless communication between the RPU and other sources of information (e.g. the general subscriber telephone network) via a secondary wireless link" (col. 4 lines 7-12).

II.

Appellants contend that "one would not modify Anderson's RPU to program software in the earpiece, and would not modify Hagen et al.'s multiprogram unit" (Req. Reh'g 2). In support of this general argument, Appellants specifically assert the following:

- (1) Modifying the multiprogram unit of Hagen et al. to be like the RPU of Anderson would improperly render Hagen et al. unsatisfactory for its intended purpose or change the principle of operation of Hagen et al.
- (2) Modifying the RPU of Anderson to be like the multiprogram unit of Hagen et al. would improperly

render Anderson unsatisfactory for its intended purpose or change the principle of operation of Anderson.

(3) Anderson teaches away from Hagen's multiprogram unit. (Req. Reh'g 2, 6-8).

These arguments are not persuasive because the rejection is not based upon making any of these asserted modifications. We instead understand the Examiner's reliance on Anderson to be only to support the limited modification of Hagen's device so as to "us[e] a mobile wireless communication protocol to establish the communication between [Hagen's] mobile device and the programming fitting server" (Ans. 4.), but that Hagen's mobile device and programming fitting server are otherwise unchanged. Appellants have not contended why such a limited modification would be improper.

III.

Appellants contend that "[o]ne would not be motivated to expend the additional effort to substitute a mobile wireless communication protocol for a cable to provide a temporary connection between a multiprogram unit and a local computer" (Req. Reh'g 3). In support of this general argument, Appellants specifically argue the following:

- (1) There is no clearly articulated reasoning with a rational underpinning to take the isolated feature of the wireless link to the RPU 16 out of the context of the disclosure of Anderson in order to combine it with Hagen et al.
- (2) The Office does not consider the interrelated context for the claimed subject matter and the interrelated context for the references; the Office has not considered the Anderson reference in its entirety (as a whole), including portions that lead away from the claimed subject matter[.]

(3) Hardware link and wireless link are not art recognized functional equivalents.

(Req. Reh'g 3, 8-10).

These arguments are not persuasive. Just because Hagen discloses the computer and multiprogram unit to be local to each other, this does not mean that reasons to alternatively use a wireless connection were nonexistent. To the contrary, the fact that a wired connection would require that Hagen's computer and multiprogram unit be maintained in proximity to each other during the software download is precisely why one would have desired to substitute a wireless connection: so that the multiprogram unit, which is carried around by a person, does not have to be brought into local proximity of the computer while making a temporary connection.

Moreover, as alluded to by the Examiner (Ans. 3-4), Anderson provides evidence that wired connections and wireless connections were art-recognized equivalent methods of downloading software programs to mobile devices. This evidence belies the unsupported arguments by Appellants' counsel that "the substitution [of a wireless connection for a wired connection] would require significant effort, such that it would be in fact more convenient to use a cable to make a temporary connection to a local computer" (Req. Reh'g 9-10).

We therefore find the modification proposed by the Examiner to be obvious. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 402-03 (2007):

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense.

CONCLUSION

Based on the analysis above, we discern no error in our conclusion that the claimed subject matter would have been taught by the combination of the references. Accordingly, we decline to modify our Decision.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

REHEARING DENIED

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